Eddy Potash, Inc. *and* International Brotherhood of Electrical Workers, Local 611, AFL–CIO and United Steelworkers of America, AFL–CIO–CLC and International Association of Machinists and Aerospace Workers, Local Lodge 1265, AFL–CIO. Cases 28–CA–13207, 28–CA–13218, and 28–CA–13454

June 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On April 19, 1999, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Parties United Steelworkers of America and International Brotherhood of Electrical Workers filed answering briefs, the Respondent filed a reply brief, and the National Mining Association, as amicus curiae, filed a brief in support of the Respondent.[1] The General Counsel and Charging Parties United Steelworkers of America and International Brotherhood of Electrical Workers also filed cross-exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

In their cross-exceptions, the General Counsel and Charging Parties United Steelworkers of America and International Brotherhood of Electrical Workers assert that the judge erroneously failed to order a make-whole remedy for losses suffered by employees due to the Respondent's implementation of its proposal containing 12-hour shifts. For the reasons that follow, we find merit to these cross-exceptions.

We have adopted the judge's findings that the Respondent violated Section 8(a)(5) and (1) by: (1) bargaining to impasse over its proposal for 12-hour shifts for underground workers, because that was an unlawful subject of bargaining in the circumstances of this case; (2) locking out its employees in support of its unlawful bargaining demand; and (3) implementing its final proposal to the Unions, which included the 12-hour shift proposal for underground workers. The judge's recommended order requires the Respondent to make whole employees for losses suffered as a consequence of the lockout. However, the recommended order does not include a provision for any losses suffered as a result of the Respondent's subsequent implementation of 12-hour shifts for underground workers.

Where an employer unilaterally implements terms and conditions of employment without first reaching a lawful impasse, the Board has traditionally required the employer to rescind the unlawfully implemented terms and conditions of employment and to make whole employees for any losses suffered as a result of the unlawful implementation. See, e.g., *Bryant & Stratton Business Institute,* 321 NLRB 1007, 1009–1010 (1996), enfd. 140 F.3d 169 (2d Cir. 1998), supplemented 327 NLRB 1135, 1152–1153 (1999). We find that it will effectuate the policies of the Act to provide the same remedy in this proceeding, and we shall modify the judge's recommended order accordingly.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Eddy Potash, Inc., Carlsbad, New Mexico, its officers, agents, successors, and assigns, shall

1.Cease and desist from

(a) Insisting, as a condition of reaching any final collective-bargaining agreement, that the Unions agree to 12-hour shifts for employees who work underground and, in support of this proposal, bargaining to an impasse with the Unions.

(b) Locking out its employees in support of its proposal for the 12-hour shifts for employees who work underground and to break the impasse.

(c) Implementing its final proposal to the Unions, which included its proposal for 12-hour shifts for employees who work underground.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, rescind the 12-hour shift requirement for employees who work underground and bargain with the Unions as the exclusive representatives of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> ***Electrical Unit***: All employees in the Electrical Workers classifications as set forth in Article I and Exhibit A of the collective-bargaining agreement for the period July 16, 1992 to July 16, 1995, but excluding guards and supervisors as defined in the Act.

[1] The National Mining Association's motion to participate as amicus curiae is granted.

[2] We shall modify the judge's recommended order in accordance with our decisions in *Indian Hills Care Center,* 321 NLRB 144 (1996) and *Excel Container, Inc.,* 325 NLRB 17 (1997).

[3] As noted in the judge's decision, while the parties entered into a collective-bargaining agreement following the termination of the 1995 lockout, that agreement expressly reserved to all parties the right to pursue legal claims concerning the legality of the 12-hour shifts. In these circumstances, we find no merit to the Respondent's position that, because the Unions entered into the collective-bargaining agreement, the Board is without power to order any make-whole remedy concerning the unlawful implementation of 12-hour shifts.

Steelworkers Unit: All employees in the Steelworkers classifications as set forth in Article I and Exhibit A of the collective-bargaining agreement for the period July 16, 1992 to July 16, 1995, but excluding guards and supervisors as defined in the Act.

Machinists Unit: All employees in the Machinists classifications as set forth in Article I and Exhibit A of the collective-bargaining agreement for the period July 16, 1992 to July 16, 1995, but excluding guards and supervisors as defined in the Act.

(b) Make whole its employees for any loss of earnings and other benefits suffered as a result of the lockout against them and the unlawful implementation of 12-hour shifts for underground workers, in the manner set forth in the remedy section of the judge's decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Carlsbad, New Mexico copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT insist, as a condition of reaching any final collective-bargaining agreement, that the Unions agree to 12-hour shifts for employees who work underground and, in support of this position, bargain to an impasse with the Unions.

WE WILL NOT lock you out in support of our proposal for the 12-hour shifts for employees who work underground and to break the impasse with the Unions.

WE WILL NOT implement our final proposal to the Unions, including our proposal for 12-hour shifts for employees who work underground.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the 12-hour shift requirement for employees who work underground and bargain with the Unions as the exclusive representatives of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Electrical Unit: All employees in the Electrical Workers classifications as set forth in Article I and Exhibit A of the collective-bargaining agreement for the period July 16, 1992 to July 16, 1995, but excluding guards and supervisors as defined in the Act.

Steelworkers Unit: All employees in the Steelworkers classifications as set forth in Article I and Exhibit A of the collective-bargaining agreement for the period July 16, 1992 to July 16, 1995, but excluding guards and supervisors as defined in the Act.

Machinists Unit: All employees in the Machinists classifications as set forth in Article I and Exhibit A of the collective-bargaining agreement for the period July 16, 1992 to July 16, 1995, but excluding guards and supervisors as defined in the Act.

WE WILL make whole our employees for any loss of earnings and other benefits suffered as a result of the lockout against them and the unlawful implementation of 12-hour shifts for underground workers, less any net interim earnings, plus interest.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

EDDY POTASH, INC.

Paul R. Irving, Esq., for the General Counsel.
W. T. Martin, Jr., Esq. (Martin & Shanor), of Carlsbad, New Mexico *and Walter W. Christy, Esq. (the Kullman Firm),* of New Orleans, Louisiana, for the Respondent.
John L. Hollis, Esq., of Albuquerque, New Mexico, for IBEW Local 611.
Gerald Barrett, Esq. (Ward, Keenan & Barrett, P.C.), of Phoenix, Arizona, for United Steelworkers of America.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. In a nutshell, the legal issue to be determined in this case is whether Respondent Eddy Potash, Inc. (Respondent or EPI) bargained to impasse about an illegal subject of bargaining in violation of Section 8(a)(1) and (5) of the Act. Respondent mines potash in Carlsbad, New Mexico, pursuant to a mineral lease agreement with the United States Department of the Interior (Interior). The lease contains a clause providing for, inter alia, "a restriction of the work day not to exceed eight hours in any one day for underground workers except in cases of national emergency." In addition, the Mineral Lands and Mining Act of 1920, 30 U.S.C. §181 et seq. (the 1920 Act) prohibits a 12-hour shift at lands leased from Interior. Respondent's 1992–1995 collective-bargaining agreement provided for 8-hour underground shifts. On July 15, 1995, in the course of bargaining for a successor collective-bargaining agreement, Respondent insisted to impasse on inclusion of 12-hour shifts for employees who work underground. Thereafter, Respondent locked out its employees and implemented its final proposal including the 12-hour shift requirement.

Charging Party International Brotherhood of Electrical Workers, Local 611, AFL–CIO (IBEW Local 611) filed a charge in Case 28–CA–13207 on July 17, 1995. Charging Party United Steelworkers of America, AFL–CIO, CLC (USWA) filed a charge on July 19 and an amended charge on July 27 in Case 28–CA–3218. Charging Party International Association of Machinists and Aerospace Workers, Local Lodge 1265, AFL–CIO (IAM Local 1265) filed a charge in Case 28–CA–13454 on December 8. On January 9, 1996, a consolidated complaint issued. On June 5, 6, and 7, 1996, all parties agreed to submission of the matter directly to the Board with a stipulation of facts. By order of August 26, 1996, the Board approved the submission and stipulation. By order of July 17, 1998, the Board remanded the proceeding for a hearing to develop a full factual record. The Board stated, "Among the issues that the parties should address are whether other employers engaged in mining operations subject to the [1920 Act] operate with shifts in excess of 8 hours and, if so, what sanctions, if any, have been imposed pursuant to the [1920 Act]." Pursuant to the Board's remand, this case was tried in Carlsbad, New Mexico on January 21, 1999.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. Portions of the parties' joint stipulation to the Board were admitted in evidence and are relied upon extensively herein.[1] On the entire record,[2] and after considering the briefs filed by counsel for the General Counsel, counsel for the Charging Parties, and counsel for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Eddy Potash, Inc. (Respondent or EPI), a Delaware corporation with a potash mining facility in Carlsbad, New Mexico, has been engaged in the business of mining, extracting, processing, and selling potash for agricultural or other chemical uses.[3] During the 12-month period preceding June 7, 1996, Respondent purchased and received at its facility goods, materials, equipment, and supplies valued in excess of $50,000 directly from points located outside the State of New Mexico, and has also sold and shipped goods valued in excess of $50,000 from its facility in interstate commerce directly to points outside the State of New Mexico. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

IBEW Local 611, USWA Local 177,[4] and IAM Local 1265 (referred to collectively as the Unions) are labor organizations within the meaning of Section 2(5) of the Act.

III. FACTS

A. Background Facts

All three Unions have been signatory to a series of single (joint) collective-bargaining agreements with Respondent, although each Union has been separately certified to represent one of three separate bargaining units of Respondent's employees.[5] Respondent has recognized, by reason of prior certifications, each of the labor organizations as the exclusive representative of its respective unit of employees. Each unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. By virtue of Section 9(a) of the Act, each Union is the exclusive representative of its respective unit for purposes of collective bargaining. The most recent collective-bargaining agreement was effective by its terms from July 16, 1992, to 7 a.m. on July 16, 1995.

Respondent leases most of the land on which it operates its facility from Interior pursuant to a mineral lease agreement made under the 1920 Act.[6] The original lease covering the land upon which Respondent operates its facility, entered into between Interior and a predecessor of Respondent, is dated December 6, 1950. A successor lease was effective from October 1, 1957 to October 1, 1977. During 1990, Respondent entered into a lease readjustment, which became effective December 6, 1990, and has a term of 20 years (lease number NM LC 065081).

[1] The joint stipulation was entered into without prejudice to any objection that any party might have to relevance, materiality, or competency of any facts stated therein. Inclusion of facts is not intended to necessarily reflect the relative evidentiary weight of various facts, correspondence, lease agreements, and other documents.

[2] Credibility resolutions were not necessary in this case as there are no facts in dispute.

[3] "Potash" is potassium or a potassium compound, as used in agriculture and industry.

[4] Additionally, it is admitted that Charging Party USWA is a labor organization within the meaning of Section 2(5) of the Act.

[5] Art.1.1 of the parties' 1992–1995 collective-bargaining agreement contains a recitation of Respondent's recognition of USWA Local 177, IBEW Local 611, and IAM Local 1265.

[6] A smaller portion of the land on which Respondent operates its facility is leased to it be the State of New Mexico, and a small amount is owned by Respondent in fee.

B. Mineral Lands and Mining Act of 1920

The original lease, the 1957 lease, and the current lease were entered into between Interior and Respondent under the authority of the 1920 Act. The parties agree that the lease is subject to the provisions of Chapter 3A of Title 30 of the United States Code (see 30 U.S.C. §§181–187, 281–287). The 1920 Act provides at Section 187, inter alia, that the Secretary of the Interior may issue leases to various operators, but each lease must contain provisions attending the careful operation of mines as well as the safety and health of employees.[7] Such leases must contain specific provisions limiting the workday of underground workers to 8 hours per day except in cases of emergency. The pertinent language of Section 187 is as follows:

> Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for prevention of undue waste as may be prescribed by the said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency. . . . No such provisions shall be in conflict with the laws of the State in which the leased property is situated.

C. Respondent's Lease

Section 7 of the lease under which Respondent operates contains such an 8-hour provision, as follows:

> Sec. 7. PROTECTION OF DIVERSE INTERESTS, AND EQUAL OPPORTUNITY—Lessee shall: pay when due all taxes legally assessed and levied under the laws of the State or United States; accord all employees complete freedom of purchase; pay all wages at least twice each month in lawful money of the United States; maintain a safe working environment in accordance with standard industry practices; restrict the workday to not more than 8 hours in any one day for underground workers, except in emergencies; and take measures necessary to protect the health and safety of the public. No person under the age of 16 years shall be employed in any mine below the surface. To the extent that the laws of the State in which the lands are situated are more restrictive than the provisions of this paragraph, then the State laws apply. Lessee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and the rules and regulations, and relevant orders of the Secretary of Labor. Neither lessee nor lessee's subcontractors shall maintain segregated facilities.

D. Other Statutes and Regulations

In addition to the provisions of the 1920 Act, the parties have included other statutes and regulations for consideration. Specifically, the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. 95–164, Nov. 9, 1977, 91 Stat. 1290 (the Mine Safety Amendments) repealed Title 30, Chapter 21 of 30 U.S.C. Sec 721–740 (the Metal and Nonmetallic Mine Safety provisions). Thus, the operation of mines which had been covered under Chapter 21 (metal and nonmetallic mines) were thereafter to be covered under Chapter 22 of Title 30. In effect, this legislative change, "brought the operation of all coal and other mines under a single legislative canopy." 30 U.S.C.A. §§721–740. As set forth at §961(a), 30 U.S.C. §961(a), the Secretary of Labor was designated to assume responsibilities relating to mine safety and health in coal, metal, and nonmetallic mines. Section 961(b)(1) states, inter alia, that mandatory standards relating to mines in effect as of November 9, 1977, "shall remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines . . . until such time as the Secretary of Labor shall issue new or revised mandatory health or safety standards applicable to metal or nonmetallic mines. . . ." Pursuant to Sec. 961(b)(2), the Secretary of Labor is directed to publish such proposed mandatory health and safety standards in the Federal Register.

New Mexico state law regarding daily maximum hours of employment, as set forth at §50-4-30 NMSA 1978, is as follows:

> IV. No employee other than a fireman, law enforcement officer or farm or ranch hand whose duties require them to work longer hours, or employees primarily in a stand-by position, shall be required to work for any employer within the state more than sixteen hours in any one day of twenty-four hours except in emergency situations.
>
> V. Any person violating any of the provisions of this act [section] shall be guilty of a misdemeanor.

E. Correspondence with Governmental Agencies Regarding Coverage of the 8-Hour Shift Language

On June 16, 1989, IMC Fertilizer, Inc. (IMC), another potash mining company operating a facility in the Carlsbad, New Mexico area, objected to the 8-hour provisions of its readjusted mineral lease, a lease under the authority of the 1920 Act and containing 8-hour shift language similar to that contained in Respondent's lease.[8] IMC filed its objections with the Bureau of Land Management (BLM) in Santa Fe, New Mexico. By letter dated September 7, 1989, Clarence F. Hougland, chief of the BLM's Lands and Mining Unit, informed IMC that the BLM could not comply with IMC's request, and that the terms and conditions in its lease, i.e., those restricting the workday to not more than 8 hours in any one day for underground workers, remain unchanged.

During late 1993 or early 1994, Respondent contacted BLM seeking relief from the 8-hour shift language of Section 7 of its lease. By letter dated April 22, 1994, BLM Assistant District Manager, Minerals, Tony L Ferguson, responded. Respondent sought the removal of the 8-hour shift language from its lease, and, in the alternative, that the BLM waive the 8-hour restrictions of the lease. Ferguson denied Respondent's request to remove the 8-hour shift language from its lease, and in doing so he referenced and attached the 1989 correspondent between BLM and IMC and also a BLM internal memorandum from Gayle E. Manges, field solicitor of BLM's Southwest Region, to BLM's state director.

The BLM, by Ferguson, also denied Respondent's request to waive the 8-hour restrictions, explaining as follows:

> The second portion of your request deals with the waiver of the [8-hour shift] requirement. We have researched our regu-

[7] In 1978, §187 was amended (Pub. L. 95–554) to substitute "provisions prohibiting the employment of any child under the age of sixteen in any mine below the surface" for "provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface." 30 U.S.C.A. §187, amended October 30, 1978, Pub. L. 95–554, §5, 92 Stat. 2074.

[8] IMC objected to the following provision of its Potassium Lease, Notice of Readjusted Lease, which it received on May 4, 1989: "Sec. 7. Protection of Diverse Interests, and Equal Opportunity—Restrict the workday to not more than 8 hours in any one day for underground workers, except in emergencies."

> lations and do not find any authority for the granting of a waiver in this situation. According to Section 2(m) of the lease document, the workday is not to exceed eight (8) hours in any one day for underground workers, *except* in an emergency.
>
> We have examined our regulations and guidance to determine what constitutes an emergency and find that emergency is normally identified with accidents/incidents that are directly related to the safety of the miners. (emphasis in original)

On May 18, 1994, Lesley Cone, district manager of BLM's Roswell, New Mexico office, sent Respondent a letter which reads in pertinent part:

> This is in reference to your request concerning the Bureau of Land Management's (BLM) lease requirement for length of shifts. As you know, BLM does not have jurisdiction over labor issues, that is the responsibility of the Department of Labor.
>
> The 1920 Mineral Leasing Act does require a lease stipulation which addresses length of shifts. These can be modified in emergency situations. However, it is not BLM's intent to intercede into jurisdictional issues more appropriately dealt with by the Department of Labor.

Respondent interpreted BLM's May 18, 1994 letter as indicating that should Respondent institute work shifts longer than eight hours, BLM would not intervene.

The BLM later provided an "additional response" to Respondent regarding its request for a waiver by letter dated July 11, 1994, from Arthur Arguedas, Field Solicitor, Department of the Interior, Santa Fe, New Mexico Field Office. In his letter Arguedas informs Respondent that ". . . the 8-hour workday stipulation in each lease is required by federal law, 30 U.S.C. §187. BLM has no authority to remove the stipulation from any lease. It has no authority to 'waive' the requirement of the statute. . . ." Arguedas' letter also contains the following:

> I note that this office has found no court decision that we believe adjudicates the meaning or the current-day enforceability of the 8-hour provision of the statute. We express no view as to whether the statute remains effective. A proper determination of those questions can be made only by judicial decision, not by an advisory opinion from this office.
>
> BLM is skeptical of your assertion that economic circumstances might constitute the sort of "emergency" within the meaning of the statute that would allow workdays of more than eight hours, but it has no occasion to decide such a matter. Even if economic conditions could constitute an emergency in some instances, BLM has no knowledge as to whether Eddy's financial situation is such that an "emergency" exists.
>
> Again, if some Agency is to make a judgment on matters of labor law or on mine safety or on potash economics, it must be a labor agency or a judicial of administrative decision making body. BLM declines at this time to become enmeshed in the currently-pending potash industry labor/management disputes.
>
> I do note that the potash leases contain provisions that a party to the lease may follow in the event of an alleged breach or default. To date BLM has not taken any action (e.g., a citation or notice of default) that would lead to either a judicial or an administrative dispute or decision on whether the 8-hour requirements of Eddy's lease have been violated. Other than to seek a waiver, Eddy also has not sought a formally adjudicated decision on this matter.

On August 2, 1994, the USWA made inquiry, by letter, to the United States Department of Labor's Mine Safety and Health Administration (MSHA). The letter, to J. Davitt McAteer, Assistant Secretary of Labor for Mine safety and Health, posed the following:

> Eddy Potash operates an underground mine in Carlsbad, NM, on lease federal land. The Mineral Leasing Act of 1920 includes language . . . requiring leases to contain a provision restricting the workday to no more than 8 hours. Eddy's lease does contain that provision.
>
> However, the company claims that the provision is invalid, on the grounds that mine safety matters were transferred from the Department of the Interior to the Department of Labor with the 1977 Federal Mine Safety and Health Act. Our reading of the Act is that it transferred only those functions contained in the 1969 Federal Coal Mine Health and Safety Act and the Federal Metal and Nonmetallic Mine Safety Act. (Addendum Sec. 301).
>
> We would appreciate a letter stating MSHA's position as quickly as possible.

By letter dated August 3, MSHA's McAteer replied to the USWA as follows:

> This letter responds to your request for the views of the Mine Safety and Health Administration (MSHA) on 30 U.S.C. Sec. 187, which deals with certain leases involving federal lands
>
> MSHA is responsible for enforcement of the Federal Mine Safety and Health Act of 1977 (Mine Act) and regulations pursuant to that statute. The Mine Act did not repeal 30 U.S.C. 187, nor is the Mine Act in conflict with that provision.

In December 1992, the BLM's office in Utah granted a coal-mining company a variance from the 8-hour requirement. Thus, in a case involving Utah Fuel Company (UFC), a coal mining concern, the BLM granted UFC a waiver of the 8-hour shift rule on the basis that UFC had been granted a variance by the Industrial Commission of Utah from the State of Utah's 8-hour shift law. The variance granted by the BLM was to remain valid "as long [as] the variance of the [Industrial] Commission [of Utah] remains in effect."

At no time has the Secretary of the Interior, the BLM, or the United States Department of Labor (DOL) taken any action to declare Respondent's lease in default for any violation of the 8-hour shift provision.

F. 12-hour Shifts

Toward the end of 1993, Respondent contacted the Unions to determine if they had any objections to the institution of a 12-hour shift. Respondent took the position that under article 3 (management rights) and article 5.6 (hours of work and overtime) of the collective-bargaining agreement, it had the right to establish such underground shifts even without the Union's approval.[9] Prior to

[9] Art. 5.6 of the contract specifically sets the shift lengths for surface and lading dock employees at 8 hours. This restriction is not specifically set forth for underground or mining employees.

January 1994, the Unions advised Respondent that they would not agree to the establishment of 12-hour shifts.

In January 1994, Respondent instituted 12-hour underground shifts. Thereafter, grievances were filed by each of the Unions. The grievances were referred for arbitration under the contract and on July 12, 1994, an arbitration hearing was conducted before Arbitrator Francis X. Quinn. On September 9, 1994, Arbitrator Quinn issued his decision wherein he sustained the grievances, finding that Respondent violated the contract when it unilaterally imposed a 12-hour work shift. Arbitrator Quinn also ordered Respondent to cease and desist from 12-hour work shifts and return to 8-hour shifts. Respondent complied with the arbitrator's ruling and returned to operations utilizing 8-hour shifts.

G. Negotiations: Generally

In May 1995,[10] in preparation for the pending negotiations for a successive contract, Respondent notified the Federal Mediation and Conciliation Service (FMCS) that a labor dispute existed. During an initial meeting between Kenny Leivo, Respondent's Director of Human Resources, and representatives of the three Unions, Respondent informed the Unions that during negotiations over the terms of a new contract it would plead poverty based on its poor economic condition. The Unions agreed that they would meet jointly with Respondent in negotiations, although each of the Unions would be free to assert their own positions and demands where appropriate.

Bargaining sessions were conducted on June 13, 14, 21, and 22, and during the period from July 6 through 15, until about 7 a.m. on July 16.

On June 13, the parties met for negotiations over the terms of a new contract. At this first session, Respondent was represented by Leivo, Jim Ryan, Respondent's vice president and general manager, and Hugh M. Smith, Esq., Respondent's counsel. At this first session, with all of the Unions' bargaining committees present, Respondent informed the Unions that it was entering negotiations with no additional moneys to place on the table and it was making a plea of poverty. Respondent stated that it would make all of its books available at its facility to any reputable certified public accountant of the Union's choice. On June 14, USWA International Representative Manny Sierras sent a letter to Leivo requesting "the up-to-date financial status and all pertinent information regarding [Respondent]." In response, Respondent furnished the USWA with a copy of its annual report.[11]

With the exception of the issue of 12-hour shifts, the negotiations followed a normal give and take with each party making some concessions, resulting in agreement on some issues but not all. The parties agreed that many of the provisions of the old contract would not be changed and also agreed to changes in the language of several existing articles, including changes to the grievance procedure, vacation language, safety glasses, tool replacement, issuance of safety manuals and company policies, absenteeism, job posting, and seniority. However, the primary issue from the onset of negotiations was the matter of the 12-hour shift.

H. Negotiations: The 12-hour Shift

During bargaining, Respondent sought to remove all references to an 8-hour shift from the contract, while the Unions sought to insert the 8-hour shift language in all areas where the contract was silent in that regard. Throughout negotiations, Respondent tied all wage-increase proposals to the implementation of a 12-hour shift system. At a later point in negotiations, Respondent offered an across-the-board 25-cent wage increase coupled with a "gainsharing" plan, all of which was premised on the Unions' acceptance of 12-hour shifts. Under the proposed "gainsharing" plan, employees would share in any profit realized by Respondent. Under Respondent's proposal, profit was to be determined by production and the decrease in cost per ton as production rose. During contract negotiations in both 1989 and 1992, the Unions had proposed or requested some form of profit sharing. Throughout the 1995 negotiations, Respondent consistently took the position that any increase in wages and/or a gainsharing plan must be tied to a 12-hour shift schedule or some other program or structure which would bring Respondent an immediate profit. Respondent offered to consider any union proposal along these lines so long as such an alternative would yield an immediate profit capability.

The USWA suggested an alternative to Respondent's 12-hour shift proposal that Respondent would be able to increase profits and lower costs if it were to stagger the shift times of some of the underground crews, thereby allowing for the continuation of actual mining operations.

Respondent took the position that it was a good suggestion and had been tried before, and, if it had the time, such a plan could probably work again. However, Respondent repeated that it needed operational changes that would immediately save it from losses and would immediately result in profit, namely, 12-hour shifts.

At this point in negotiations, Sierras remarked that it appeared to him that the Respondent was attempting to obtain through negotiations that which it was denied via arbitration. Leivo, on behalf of Respondent at the bargaining table, confirmed that such was the case.

During negotiations, all the Unions took the position that it was unlawful to work more than 8 hours underground. Respondent took the position that 12-hour shifts are not unlawful; that the only authority which prohibited 12-hour shifts was the lease agreement; and that the lease agreement itself provided for and prescribed a legal remedy. Respondent took the position that it did not believe that BLM would consider the implementation of 12-hour shifts as a default of the lease agreement. At the table, Respondent argued that if the Unions were successful through the Federal courts or other judicial forums, the result, i.e., a declaration of default resulting in the cancellation of the lease, would result in the closing the mine and the loss of approximately 250 jobs.

At the July 6 bargaining session, it was agreed that all parties would present their final positions on Wednesday, July 12. On July 7, Respondent notified the Unions that it would implement 12-hour shifts at the expiration of the contract if no new agreement was reached, and that it was not interested in extending the current contract beyond its July 16 expiration date.

On July 12, the Respondent presented its final position which included an additional across-the-board direct wage increase and an increase to the previously proposed gainsharing plan (i.e., an

[10] All dates hereafter are in 1995.

[11] Later, on Friday, July 14, Sierras called Smith and asked if Sierras' agents would be permitted to examine Respondent's books. Smith told Sierras that his agents and accountants would be allowed to examine Respondent's books, and that such inspection would have to occur on Respondent's premises due to the volume and location of the variety of documents and data necessary to perform a bona fide audit. Thereafter, USWA agents from its headquarters in Pittsburgh, Pennsylvania requested from Respondent an up-to-date financial report (annual report). Respondent's annual report was, prior to July 16, again provided to the USWA.

increase in the gainsharing split in favor of the employees),[12] but conditioned such proposals on the Unions' acceptance of the principle of 12-hour shifts. The language proposed by Respondent would allow it to schedule 12-hour shifts at its option. Respondent reminded the Unions that the language sought did not necessarily mean that the 12-hour shifts would be in place forever.

During the July 12 negotiation session, each Union was asked by the Respondent if it would accept the 12-hour shifts under any conditions, and if there was anything that Respondent could do to persuade the Unions to accept the 12-hour shifts. Each Union responded "no" to such inquiries. At this point in negotiations, Respondent declared that if a contract could not be reached by 7 a.m. on July 16, Respondent would institute a lockout. At the request of the Unions, the Respondent agreed to set forth its positions in writing. Respondent's representatives presented the Unions' representatives with a document entitled, "Eddy Potash Statement of Position Regarding Negotiations for Labor Agreement and Mine Operations," which includes the following:

> 1. 12-hour shift is essential for viable long-term operation. It also provides opportunity for substantial increase in wages through a gainsharing program as well as a wage increase.
>
> 2. [Respondent] cannot continue to work under present labor agreement.
>
> 3. Regret[t]ably, if an agreement is not reached by July 16, at 7:00 a.m., [Respondent] will be forced to declare a lockout.
>
> 4. If however, a number of employees sufficient to ensure safe and effective operations indicate their willingness to work without a contract, the lock-out will be lifted and they will be able to do so on a 12-hour-shift basis and under the other terms and conditions of the [Respondent's] final proposal. Operations would then resume as soon as reasonably possible. The Unions will be notified of any expected changes in the status of operations.

On or about July 15, Respondent insisted, as a condition of reaching any final collective-bargaining agreement, that the Unions agree to 12-hour shifts for employees represented by them. On or about July 15, in support of its proposal for a 12-hour-shift system, Respondent declared an impasse in bargaining with the Unions.

On Sunday, July 16, employees reporting for the morning shift were held at the mine hoist and skip until approximately 7 a.m., and then sent home by Respondent. Respondent thereby instituted a lockout. From that point on, Respondent maintained its lockout of employees represented by the Unions. Respondent implemented it final proposal to the Unions, which included a 12-hour-shift system.

On July 10, 12, 16, 19, and 26, and August 1, Respondent distributed letters to its employees addressed to "Dear Employee and Family" or "Dear Eddy Potash Employee." In its July 16 letter to employees, Respondent states that, ". . . should you wish to return to work, you should notify us . . . by calling Kenny Leivo . . . at the minesite at 887–2844, Ext 239. You may also call our answering machine number . . . anytime. . . ." The answering machine played the following message, recorded by Leivo, to those calling:

> You have reached the Eddy Potash information line. This line has been set up for employees to notify us if they wish to return to work under the terms and conditions of our final proposal. If you are willing to come back to work under those conditions, please leave your name and telephone number and we will get back to you regarding when and if the lock-out will be lifted. Thank you very much.

I. Duration of Lockout; Interim Agreement; Current Status

The lockout ended on August 7 under the terms of an interim agreement entered into by Respondent and the Unions. Thereafter, the parties entered into a collective-bargaining agreement (the final agreement), under which the parties are currently working. Both the interim and final agreements contain the following provision at Article 18.5:

> With the exception of and excluding the Minerals Leasing Act of 1920, Title 30, §187; any provisions of this contract in conflict with or in violation of any applicable State or Federal Law, shall be inoperative and of no effect, but shall not affect the remaining provisions hereof. Provisions of this agreement for shifts in excess of 8 hours and daily overtime shall not be subject to the to the grievance and arbitration provisions contained herein. Nothing in this Article shall preclude either Party from pursuing legal recourse or appeal of any action by any court or other governmental body concerning the legality of 12-hour shifts.

J. Practices in the Carlsbad area

There are four potash mines in the Carlsbad area. From time to time, these mining entities have required that employees work in excess of 8 hours. Generally, this took the form of overtime hours which were sporadically assigned as needed. BLM never notified Respondent that it considered the overtime for underground miners in excess of 8 hours to be a violation of the 1920 Act of or the potassium leases. In addition, Respondent required 10-hour shifts of its employees for a period of time when it was going through bankruptcy proceedings. Although Respondent instituted 12-hour shifts in January 1994 and August 1995, BLM never notified Respondent that it considered the extended 12-hour shifts a breach of the 1920 Act or of the leases. On both occasions when the 12-hour shifts were implemented, Respondent notified BLM. BLM did not take any action on these occasions to declare Respondent's lease in default. Other mines in the Carlsbad area have also implemented 10-hour or 12-hour shifts at about the same time that Respondent did. BLM has not taken any action to treat any of the mines as having violated that 1920 Act or their leases because of implementation of the 12-hour shift.

IV. ANALYTICAL FRAMEWORK

Generally, subjects of bargaining are categorized as mandatory or nonmandatory.[13] Mandatory subjects are those which "vitally affect" employees.[14] Current industry practices, "although not conclusive," are "highly relevant" in determining which subjects

[12] During the course of negotiations, Respondent gradually increased its gainsharing proposal from 33 percent (i.e., 33 percent of profits over a projected amount would go to employees' bonuses) to 39 percent and finally to 45 percent.

[13] *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342, 349 (1958).

[14] *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 179 (1971), relying on *Teamsters Local 24 v. Oliver,* 358 U.S. 283 (1959) and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

are mandatory.[15] In making the determination regarding which subjects are mandatory, the Board has primary responsibility.[16]

In practical terms this means a party may bargain to impasse regarding a mandatory subject of bargaining. Parties may bargain regarding permissive subjects of bargaining and, if agreement is reached, include such subjects in their collective-bargaining agreement. However, a party may not insist to impasse that a permissive subject of bargaining be included.[17] Illegal subjects of bargaining are those which are unlawful or inconsistent with the basic policy of the Act.[18] The parties may not include such subjects in their agreement. A party who insists to impasse on an illegal subject of bargaining violates the Act.[19] Examples of subjects which have been held illegal subjects under the Act are modification of provisions of a court-approved Title VII settlement agreement incorporated in the parties' collective-bargaining agreement,[20] closed-shop provisions,[21] and hot cargo clauses.[22]

VI. ARGUMENTS

Counsel for the General Counsel argues that Respondent's insistence on shifts longer than 8 hours is contrary to the 1920 Act. Counsel notes that Congress amended the 1920 Act in 1978 by deleting the prohibition of women working underground. In addition, counsel asserts that the Federal Mine Safety and Health Amendments Act of 1977 did not emasculate the 1920 Act as evidenced by later litigation regarding matters of health, safety, and labor relations of miners pursuant to the1920 Act.[23] Further, counsel reasons that in order to find that the MSHAA transferred mine safety matters from the Secretary of the Interior to the Secretary of Labor, one would have to conclude that Congress meant something other than what it said or, at best, a repeal by implication, much disfavored in the law.

Counsel for the General Counsel, in addition, notes that the failure of BLM or DOL to act to enforce the 8-hour provision in Respondent's lease does not lessen the viability of the statute.[24] Counsel also notes that New Mexico state law is less restrictive than Section 187. Accordingly, counsel reasons that New Mexico law (which allows shifts of 16 hours in any one day) does not control because Section 187 specifically provides that it shall not be in conflict with state law where the property is leased and the lease specifically provides that state law shall control only where it is more restrictive.

Counsel for IBEW Local 611 asserts that Section 187 and the resulting leases are clear and unambiguous. Counsel notes that the NLRB has authority to interpret this statutory scheme even though it is outside the specific contours of Board law. Counsel urges that the 1920 Act has not become dormant. Specifically, counsel points to BLM's refusal to exclude the 8-hour provision from its leases. In addition, in agreement with counsel for the General Counsel, counsel for IBEW Local 611 asserts that MSHAA did not repeal Section 187 and state law does not control the situation.

Counsel for USW emphasizes that BLM does not assert that the statute is void, nor does it contest the plain meaning of Section 187. Counsel notes that BLM has never approved Respondent's request to schedule shifts in excess of 8 hours. Counsel asserts that because BLM's position is that it is not the appropriate authority to enforce the 8-hour provision, its only recourse in a case such as this is the draconian one of canceling the lease.

Counsel also notes that even though the statute may have been dormant for many years, it does not diminish the force of the statute. Counsel urges that a finding by the Board that the statute is not enforceable would be inconsistent with Congressional concern for the health and safety of the miners. Moreover, counsel argues that because Respondent's contract proposal was unlawful under the plain meaning of Section 187, the Board should not explore the frequency or manner of enforcement.

Respondent asserts that the requirement of a 12-hour shift does not violate Section 187 or the MSHAA. Respondent notes that Section 187 provides that state law controls over any statutorily mandated provision in a federal mineral lease. Relying on *Ventura County v. Gulf Oil Corp.,* 601 F.2d 1080 (9th Cir. 1979) and *Kirkpatrick Oil & Gas Co. v. U.S.,* 675 F.2d 1122 (10th Cir. 1982), Respondent asserts that Section 187 yields to state law if the terms of Section 187-mandated lease provisions conflict with state law. Contending that those provisions do conflict, Respondent relies upon New Mexico law, which allows employees to work up to 16 hours in a day. Accordingly, Respondent concludes that the issue of 12-hour shifts is not an illegal subject of bargaining.

Respondent also notes that MSHAA took the position that its regulatory scheme was not in conflict with Section 187. Because neither the MSHAA nor the regulations propounded thereunder address the number of hours which may be worked by underground miners, Respondent asserts its proposal was not in violation of MSHAA. Reasoning that its proposal was not unlawful, and was in fact justified by compelling economic necessity, Respondent concludes that it lawfully reached impasse and locked out employees thereafter.

Finally, Respondent avers that the NLRB does not have authority to construe or enforce a contractual provision between Respondent and BLM. Respondent notes that BLM has taken no action to cancel Respondent's lease. Because the Union's claims against Respondent are actually a dispute under the 1920 Act, the Board has no jurisdiction or, assuming it has jurisdiction, it should exercise its discretion to decline jurisdiction under principles of comity and deference to sister agencies.

VII. ANALYSIS

Hours of work are a mandatory subject of bargaining.[25] Accordingly, before altering the hours of employees' work, an

---

[15] *Ford Motor Co. v. NLRB,* 441 U.S. 488, 501 (1979).

[16] Id. at 497.

[17] *Borg Warner*, supra, 356 U.S. at 349.

[18] *National Maritime Union (Texas Co.),* 78 NLRB 971, 981–982 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), *cert. denied,* 338 U.S. 954 (1950); *see also, Massillon Community Hospital,* 282 NLRB 675, 676 (1987).

[19] *Honolulu Star-Bulletin*, 123 NLRB 395 (1959), enft. denied on other grounds, 274 F.2d 567 (D.C. Cir. 1959).

[20] *Chesapeake Plywood*, 294 NLRB 201 (1989), enfd. in part and denied in part, unpublished, 917 F.2d 22 (4th Cir. 1990).

[21] *Penello v. Mine Workers,* 88 F.Supp. 935 (D.C. Cir. 1950).

[22] *Lithographers Local 17 (Graphic Arts Employers Assn.),* 130 NLRB 985 (1961), enfd. 309 F.2d 31 (9th Cir. 1962), cert. denied, 372 U.S. 943 (1963).

[23] Counsel cites *Ventura County v. Gulf Oil,* 601 F.2d 1080 (9th Cir. 1979) affd. on appeal*,* 445 U.S. 947 (1980), acknowledging that all parties rely on the case, and argues that the case supports a finding that Sec. 187, "remains a viable, enforceable federal statute." (Brief of counsel for the General Counsel at 15, fn. 11).

[24] Counsel cites *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968) ("The fact that the statute lay partially dormant for many years cannot be held to diminish its force today.").

[25] *Meat Cutters Locals 189, 320, 546, 571, 638 v. Jewel Tea Co.,* 381 U.S. 676, 691 (1965):

> Contrary to the Court of Appeals, we think that the particular hours of the day and the particular days of the week during which employees

employer must bargain.[26] Respondent has satisfied this requirement. However, in so doing, Respondent allegedly insisted upon an illegal subject of bargaining.

Just as the factual existence of impasse, lockout, and unilateral implementation are not disputed, several legal issues are also not in dispute. First, Section 187 of the 1920 Act has not been specifically repealed by any other legislation. In fact, in 1978, it was amended to conform with Title VII. One might argue that if Congress had intended to repeal the 8-hour shift provision, it would have done so in 1978. However, it did not do so. Moreover, because this amendment occurred after the MSHAA transferred mine safety matters from Interior to Labor, it does not appear that MSHAA repealed Section 187. Second, the requirement of 8-hour shifts in Section 187 has not been the subject of litigation in reported decisions arising under the 1920 Act. However, in agreement with counsel for the General Counsel, I find that the dormancy of a statute does not diminish its force.[27] Third, BLM continues to insert the 8-hour shift requirement in its mineral leases and refuses to waive this 8-hour shift requirement, officially taking the position that the matter is not appropriately litigated before it. Unless New Mexico law supersedes the language of Respondent's mineral lease, as Respondent suggests, a shift other than the 8-hour shift is technically unlawful pursuant to the 1920 Act.

In construing the provisions of the 1920 Act and the provisions of New Mexico's wage and hour law, I conclude that the 1920 Act has not been superseded by New Mexico law. The 1920 Act sets 8-hour shifts stating that this shall not be in conflict with the laws of the State in which the property is lease. New Mexico law allows 16-hour shifts in a 24-hour day except in emergencies. The 1920 Act is certainly more restrictive than New Mexico law. However, there is no conflict between the two. Moreover, Respondent's lease provides that state law will prevail only where the state law is more restrictive.[28]

Having rejected the grounds raised for dismissal of the complaint, I find that the 1920 Act's requirement of an 8-hour shift for miners remains in effect. I further find that Respondent, by bargaining to impasse regarding a 12-hour shift, violated the Act by insisting to impasse on an unlawful subject of bargaining. It follows that the lockout was also unlawful.[29]

This analysis has not utilized the evidence requested by the Board regarding industry practice or BLM's failure to cancel the leases when lessees have violated the 8-hour-shift requirement. In my view, industry practice does not answer the question about legality of actions. Nor does BLM's failure to cancel leases serve to endorse the actions of its lessees in instituting a 12-hour-shift requirement. This is especially so in light of BLM's failure to grant waivers to allow the 12-hour shifts. However, in one respect, industry practice is relevant. That is in determining which subjects are mandatory subjects of bargaining. And with this observation, the analysis comes full circle. Obviously, hours are a mandatory subject of bargaining. The fact that other mines followed Respondent's lead and also instituted 12-hour shifts, does not advance the analysis, in my view.

CONCLUSIONS OF LAW

1. By insisting, as a condition of reaching any final collective-bargaining agreement, that the Unions agree to 12-hour shifts for employees who work underground, and in support of this proposal, bargaining to an impasse with the Unions, Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By locking out its employees in support of its proposal for the 12-hour shift and to break the impasse, Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

3. By implementing its final proposal to the Union which included its proposal for a 12-hour shift, Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent's lockout was unlawful, Respondent shall make its employees whole for any loss of earnings and other benefits suffered as a result of the lockout with backpay to be computed in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

may be required to work are subjects well within the realm of "wages, hours, and terms and conditions of employment" about which employers and unions must bargain.

[26] See, e.g., *Kal Kan Foods,* 288 NLRB 590 (1988) (unilateral institution of a 7-day, 12-hour-shift system in lieu of three 8-hour shifts, 5 days per week unlawful); *RAHCO, Inc.,* 265 NLRB 235 (1982).

[27] See *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968); *IT&T v. U.S.,* 536 F.2d 1361 (Ct. Claims 1976).

[28] Respondent's argument that the NLRB does not have authority to construe or enforce the lease provisions of its contract misses the point. My finding is not based on the provisions of the lease. Rather, it is based on the provisions of the 1920 Act. Moreover, to the extent Respondent argues that only BLM may declare its actions unlawful, I find that BLM essentially did just that when it refused to grant Respondent a waiver. The fact that it has not taken the further action of canceling Respondent's mineral lease does not suggest otherwise.

[29] See, e.g., *C-E Natco/C-E Invalco,* 272 NLRB 502, 505 (1984).